

STACEY D. COX,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,  
Defendant.

BEFORE THE COURT are cross-Motions for Summary Judgment (ECF No. 13, 17.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Benjamin J. Groebner represents Defendant. The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

Plaintiff Stacey D. Cox (Plaintiff) protectively filed for disability insurance benefits on May 27, 2008. (Tr. 9.) Plaintiff alleged disability began January 1, 2003. (Tr. 146.) Benefits were denied initially and on reconsideration. (Tr. 96, 108.) Plaintiff requested a hearing before an administrative law judge (ALJ), which

1 was held before ALJ Robert S. Chester on January 21, 2010. (Tr. 37-  
2 63.) Plaintiff was represented by counsel and testified at the  
3 hearing. (Tr. 39-59.) Vocational expert Daniel McKinney also  
4 testified. (Tr. 60-62.) The ALJ denied benefits and the Appeals  
5 Council denied review. (Tr. 1, 9-22.) The instant matter is before  
6 this court pursuant to 42 U.S.C. § 405(g).

7 **STATEMENT OF FACTS**

8 The facts of the case are set forth in the administrative hearing  
9 record and will, therefore, only be summarized here.

10 Plaintiff was 32 years old at the time of the hearing. (Tr. 39.)  
11 Plaintiff went to school through the tenth grade and has a GED. (Tr.  
12 41.) Her last job was in 1997 picking eggs at an egg farm. (Tr. 41-  
13 42.) She left that job because she was pregnant and was put on bed  
14 rest. (Tr. 42.) She also has work experience as a cashier at a  
15 convenience store, a telemarketer and a housekeeper. (Tr. 42, 60.)  
16 Plaintiff testified she has not worked since 1997 because she has  
17 posttraumatic stress disorder due to domestic violence. (Tr. 43.)  
18 She said she has pain and numbness in her feet due to second and third  
19 degree burns sustained when she was a child. (Tr. 43-45.) She also  
20 experiences radiating pain and numbness in her lower back. (Tr. 45-  
21 46.) Plaintiff testified she has extreme pain in her upper back and  
22 neck which causes headaches a couple of times a week. (Tr. 47.) She  
23 also has pain in her abdomen every day. (Tr. 49.) She experiences  
24 diarrhea four to six times per day four days per week. (Tr. 49-50.)  
25 Plaintiff testified she suffers from anxiety and depression. (Tr.  
26 54.) She has been treated for alcohol abuse and prescription narcotic  
27 abuse. (Tr. 58.)

**STANDARD OF REVIEW**

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. See *Jones v. Heckler*, 760 F. 2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180  
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
3 Nevertheless, a decision supported by substantial evidence will still  
4 be set aside if the proper legal standards were not applied in  
5 weighing the evidence and making the decision. *Browner v. Sec'y of*  
6 *Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). Thus,  
7 if there is substantial evidence to support the administrative  
8 findings, or if there is conflicting evidence that will support a  
9 finding of either disability or nondisability, the finding of the  
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
11 1230 (9<sup>th</sup> Cir. 1987).

#### 12 SEQUENTIAL PROCESS

13 The Social Security Act (the "Act") defines "disability" as the  
14 "inability to engage in any substantial gainful activity by reason of  
15 any medically determinable physical or mental impairment which can be  
16 expected to result in death or which has lasted or can be expected to  
17 last for a continuous period of not less than 12 months." 42 U.S.C.  
18 §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that a  
19 Plaintiff shall be determined to be under a disability only if his  
20 impairments are of such severity that Plaintiff is not only unable to  
21 do his previous work but cannot, considering Plaintiff's age,  
22 education and work experiences, engage in any other substantial  
23 gainful work which exists in the national economy. 42 U.S.C. §§  
24 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability  
25 consists of both medical and vocational components. *Edlund v.*  
26 *Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

27 The Commissioner has established a five-step sequential  
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1 evaluation process for determining whether a claimant is disabled. 20  
2 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is  
3 engaged in substantial gainful activities. If the claimant is engaged  
4 in substantial gainful activities, benefits are denied. 20 C.F.R. §§  
5 404.1520(a)(4)(I), 416.920(a)(4)(I).

6 If the claimant is not engaged in substantial gainful activities,  
7 the decision maker proceeds to step two and determines whether the  
8 claimant has a medically severe impairment or combination of  
9 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If  
10 the claimant does not have a severe impairment or combination of  
11 impairments, the disability claim is denied.

12 If the impairment is severe, the evaluation proceeds to the third  
13 step, which compares the claimant's impairment with a number of listed  
14 impairments acknowledged by the Commissioner to be so severe as to  
15 preclude substantial gainful activity. 20 C.F.R. §§  
16 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.  
17 1. If the impairment meets or equals one of the listed impairments,  
18 the claimant is conclusively presumed to be disabled.

19 If the impairment is not one conclusively presumed to be  
20 disabling, the evaluation proceeds to the fourth step, which  
21 determines whether the impairment prevents the claimant from  
22 performing work he or she has performed in the past. If plaintiff is  
23 able to perform his or her previous work, the claimant is not  
24 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
25 this step, the claimant's residual functional capacity ("RFC")  
26 assessment is considered.

27 If the claimant cannot perform this work, the fifth and final  
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1 step in the process determines whether the claimant is able to perform  
2 other work in the national economy in view of his or her residual  
3 functional capacity and age, education and past work experience. 20  
4 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482  
5 U.S. 137 (1987).

6 The initial burden of proof rests upon the claimant to establish  
7 a *prima facie* case of entitlement to disability benefits. *Rhinehart*  
8 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d  
9 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once the  
10 claimant establishes that a physical or mental impairment prevents him  
11 from engaging in his or her previous occupation. The burden then  
12 shifts, at step five, to the Commissioner to show that (1) the  
13 claimant can perform other substantial gainful activity, and (2) a  
14 "significant number of jobs exist in the national economy" which the  
15 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir.  
16 1984).

17 However, a finding of "disabled" does not automatically qualify  
18 a claimant for disability benefits. *Bustamante v. Massanari*, 262 F.3d  
19 949, 954 (9<sup>th</sup> Cir. 2001.) When there is medical evidence of drug or  
20 alcohol addiction, the ALJ must determine whether the drug or alcohol  
21 addiction is a material factor contributing to the disability. 20  
22 C.F.R. §§ 404.1535(a), 416.935(a). It is the claimant's burden to  
23 prove substance addiction is not a contributing factor material to her  
24 disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007).

25 If drug or alcohol addiction is a material factor contributing to  
26 the disability, the ALJ must evaluate which of the current physical  
27 and mental limitations would remain if the claimant stopped using  
28 drugs or alcohol, then determine whether any or all of the remaining

1 limitations would be disabling. 20 C.F.R. §§ 404.1535(b)(2),  
2 416.935(b)(2).

### 3 **ALJ'S FINDINGS**

4 At step one of the sequential evaluation process, the ALJ found  
5 Plaintiff has not engaged in substantial gainful activity since May  
6 27, 2008, the application date. (Tr. 11.) At step two, the ALJ found  
7 Plaintiff has the following severe impairments: post-traumatic stress  
8 disorder (PTSD) and depression. (Tr. 11.) At step three, the ALJ  
9 found Plaintiff does not have an impairment or combination of  
10 impairments that meets or medically equals any of the impairments  
11 listed in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 12.) The ALJ then  
12 found, "the claimant has the residual functional capacity to perform  
13 a full range of work at all exertional levels but with the following  
14 nonexertional limitations: she is limited to simple, non-complex work  
15 involving infrequent interaction with the general public and no more  
16 than superficial contact with co-workers." (Tr. 14.) At step four,  
17 the ALJ determined Plaintiff is capable of performing past relevant  
18 work. (Tr. 21.) As a result, the ALJ concluded Plaintiff has not  
19 been disabled, as defined in the Social Security Act, since May 27,  
20 2008, the date the application was filed. (Tr. 21.)

### 21 **ISSUES**

22 The question is whether the ALJ's decision is supported by  
23 substantial evidence and free of legal error. Specifically, Plaintiff  
24 asserts the ALJ erred by: (1) failing to identify any severe physical  
25 impairments; (2) improperly rejecting medical opinions; (3) made an  
26 improper credibility finding; and (4) posing an incomplete  
27 hypothetical to the vocational expert. (ECF No. 14 at 11-19.)  
28 Defendant argues the ALJ: (1) properly determined Plaintiff is not

1 credible; (2) properly evaluated the medical evidence; (3) properly  
2 determined Plaintiff does not have a severe physical impairment; and  
3 (4) properly determined Plaintiff's RFC and posed a hypothetical to  
4 the vocational expert which takes into account Plaintiff's mental  
5 limitations. (ECF No. 18 at 4-20.)

## 6 DISCUSSION

### 7 A. Credibility

8 Plaintiff argues the ALJ did not make a proper credibility  
9 finding regarding her irritable bowel syndrome symptoms. (ECF No. 14  
10 at 15-16.) In social security proceedings, the claimant must prove  
11 the existence of a physical or mental impairment by providing medical  
12 evidence consisting of signs, symptoms, and laboratory findings; the  
13 claimant's own statement of symptoms alone will not suffice. 20  
14 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
15 the basis of a medically determinable impairment which can be shown to  
16 be the cause of the symptoms. 20 C.F.R. § 4416.929.

17 Once medical evidence of an underlying impairment has been shown,  
18 medical findings are not required to support the alleged severity of  
19 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir. 1991).  
20 If there is evidence of a medically determinable impairment likely to  
21 cause an alleged symptom and there is no evidence of malingering, the  
22 ALJ must provide specific and cogent reasons for rejecting a  
23 claimant's subjective complaints. *Id.* at 346. The ALJ may not  
24 discredit pain testimony merely because a claimant's reported degree  
25 of pain is unsupported by objective medical findings. *Fair v. Bowen*,  
26 885 F.2d 597, 601 (9th Cir. 1989). The following factors may also be  
27 considered: (1) the claimant's reputation for truthfulness; (2)  
28 inconsistencies in the claimant's testimony or between his testimony

1 and his conduct; (3) claimant's daily living activities; (4)  
2 claimant's work record; and (5) testimony from physicians or third  
3 parties concerning the nature, severity, and effect of claimant's  
4 condition. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir. 2002).

5 If the ALJ finds that the claimant's testimony as to the severity  
6 of her pain and impairments is unreliable, the ALJ must make a  
7 credibility determination with findings sufficiently specific to  
8 permit the court to conclude that the ALJ did not arbitrarily  
9 discredit claimant's testimony. *Morgan v. Apfel*, 169 F.3d 595, 601-02  
10 (9<sup>th</sup> Cir. 1999). In the absence of affirmative evidence of  
11 malingering, the ALJ's reasons must be "clear and convincing."  
12 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007);  
13 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169  
14 F.3d at 599. The ALJ "must specifically identify the testimony she or  
15 he finds not to be credible and must explain what evidence undermines  
16 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir.  
17 2001)(citation omitted).

18 Plaintiff testified she "has to be really close to a bathroom  
19 facility" due to diarrhea. (Tr. 49.) She testified she has diarrhea  
20 four to six times per day four times per week. (Tr. 50.) Plaintiff  
21 said she stays in the restroom up to 45 minutes at a time. (Tr. 50.)  
22 Plaintiff asserts the ALJ did not properly consider her testimony or  
23 reject her symptoms regarding her limitations from irritable bowel  
24 syndrome. (ECF No. 14 at 15.) Plaintiff argues the ALJ "failed to  
25 provide any reasons as to why her need to use the restroom was not  
26 credible and what facts led to that conclusion." (ECF No. 14 at 16.)

27 However, the ALJ specifically addressed Plaintiff's allegation  
28 that she makes frequent urgent trips to the restroom. The ALJ stated,

1 "The claimant testified to frequent restroom visits because of IBS,  
2 yet the medical evidence is essentially absent of any complaints in  
3 this regard." (Tr. 18.) The record contains references to IBS, but  
4 there is no mention of complaints of frequent urgent trips to the  
5 restroom. (E.g., Tr. 738, 834, 838, 910, 921, 923, 930, 935.) There  
6 are some references to diarrhea, but no medical provider recorded  
7 concerns or reports about the frequency or urgency of diarrhea rising  
8 to the level of a work-related limitation. (E.g., Tr. 496, 530, 534,  
9 764, 812, 821, 864, 917.) One emergency room physician opined  
10 Plaintiff's symptoms did not arise solely from IBS and questioned  
11 possible drug-seeking behavior. (Tr. 569.) The ALJ also pointed out  
12 that Plaintiff's colonoscopy showed no evidence of abnormality. (Tr.  
13 18, 742.) Thus, the ALJ specifically cited the testimony rejected and  
14 the evidence supporting her conclusion and the ALJ did not err.

15 In addition, the ALJ gave other clear and convincing reasons  
16 supported by substantial evidence for finding Plaintiff not credible,  
17 none of which are challenged by Plaintiff. (Tr. 15-20.) In support  
18 of the negative credibility finding, the ALJ cited: a lack of  
19 supporting objective medical evidence (Tr. 15-20); Plaintiff's  
20 complaint of symptoms not reported to medical providers (Tr. 15-16);  
21 non-compliance with recommended treatment (Tr. 16); Plaintiff's drug-  
22 seeking behavior (Tr. 16-18); evidence that Plaintiff exaggerated her  
23 symptoms and was seeking benefits for secondary gain and not due to  
24 disability (Tr. 17-18); evidence that Plaintiff modifies her  
25 presentation based on what she wants the end result to be (Tr. 19);  
26 and Plaintiff engaged in activities inconsistent with alleged  
27 limitations (Tr. 18). These are all permissible considerations in  
28 making a credibility assessment and the ALJ cited substantial evidence

1 supporting each reason for rejecting Plaintiff's testimony. See 20  
2 C.F.R. § 416.929(c)(2); S.S.R. 96-7p; *Thomas*, 278 F.3d at 958; *Smolen*  
3 *v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996); *Fair*, 885 F.2d at 603.  
4 As a result, the ALJ did not err.

5 **B. Medical Evidence**

6 Plaintiff argues the ALJ failed to properly reject the opinions  
7 of two physicians, Dr. Weir and Dr. Phillips. (ECF No. 14-15.) In  
8 disability proceedings, a treating physician's opinion carries more  
9 weight than an examining physician's opinion, and an examining  
10 physician's opinion is given more weight than that of a non-examining  
11 physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004);  
12 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating  
13 or examining physician's opinions are not contradicted, they can be  
14 rejected only with "clear and convincing" reasons. *Lester*, 81 F.3d at  
15 830. If contradicted, the opinion can only be rejected for "specific"  
16 and "legitimate" reasons that are supported by substantial evidence in  
17 the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir. 1995).  
18 Historically, the courts have recognized conflicting medical evidence,  
19 the absence of regular medical treatment during the alleged period of  
20 disability, and the lack of medical support for doctors' reports based  
21 substantially on a claimant's subjective complaints of pain as  
22 specific, legitimate reasons for disregarding a treating or examining  
23 physician's opinion. *Flaten v. Secretary of Health and Human Servs.*,  
24 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*, 885 F.2d at 604.

25 Plaintiff argues the ALJ did not set forth specific and  
26 legitimate reasons supported by substantial evidence in rejecting Dr.  
27 Weir's and Dr. Phillips' opinions.  
28

1           **1. Dr. Weir**

2           Dr. Weir examined Plaintiff on May 17, 2007. (Tr. 665-669.) On  
3 examination, Dr. Weir noted normal gait, station and ambulation;  
4 positive straight leg raising; positive findings on 18 of 18  
5 fibromyalgia trigger points; the ability to stand on toes and squat;  
6 and decreased sensation to light touch in the right foot. (Tr. 667-  
7 69.) Dr. Weir diagnosed chronic lumbosacral strain, neuropathy of  
8 the right foot, PTSD, fibromyalgia, osteoarthritis and headaches.  
9 (Tr. 669.) He opined that Plaintiff is limited by lumbosacral strain  
10 but is capable of standing and/or walking for about six hours in an  
11 eight-hour day with breaks every two hours; is capable of sitting for  
12 six hours in an eight-hour day with breaks every two hours; is capable  
13 of lifting and/or carrying 20 pounds occasionally and 10 pounds  
14 frequently; and is capable of occasionally bending, stooping,  
15 crouching, and crawling. (Tr. 669.) The ALJ rejected Dr. Weir's  
16 opinion. (Tr. 17.)

17           Plaintiff asserts the ALJ gave no reasons for rejecting Dr.  
18 Weir's opinion. (ECF No. 14 at 14.) However, the ALJ discussed Dr.  
19 Weir's opinion in detail and explained why the opinion was rejected.  
20 (Tr. 17.) The ALJ concluded Dr. Weir's assessed limitations are  
21 inconsistent with his examination. (Tr. 17.) A medical opinion may  
22 be rejected by the ALJ if it is conclusory, contains inconsistencies,  
23 or is inadequately supported. *Bray v. Comm'r Soc. Sec. Admin.*, 554  
24 F.3d 1219, 1228 (9th Cir. 2009); *Thomas*, 278 F.3d at 957. The ALJ  
25 pointed out there is little in Dr. Weir's findings indicating  
26 lumbosacral strain warranting postural limitations. (Tr. 17.)  
27 Further, the ALJ pointed out objective evidence inconsistent with the  
28 limitations assessed by Dr. Weir. (Tr. 17, 20.) The consistency of

1 a medical opinion with the record as a whole is a relevant factor in  
2 evaluating a medical opinion. *Lingenfelter v. Astrue*, 504 F.3d 1028,  
3 1042 (9<sup>th</sup> Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9<sup>th</sup> Cir. 2007).  
4 The ALJ noted a May 2007 lumbar x-ray showed only mild end plate  
5 changes and no evidence of acute fracture or dislocation and a  
6 November 2007 cervical x-ray reflected no acute findings and in May.  
7 (Tr. 17, 670, 759.) Additionally, the ALJ pointed out that during a  
8 psychological examination by Dr. Everhart ten days before Dr. Weir's  
9 examination, Dr. Everhart observed no pain behavior. (Tr. 17, 663.)  
10 These are specific, legitimate reasons supported by substantial  
11 evidence for rejecting Dr. Weir's opinion.

12 Furthermore, the ALJ observed that even if Dr. Weir's assessment  
13 accurately reflected Plaintiff's limitations at that time, the same  
14 limitations are not reflected during the period after May 2008, the  
15 application date.<sup>1</sup> The ALJ thoroughly detailed the medical evidence,  
16 including the opinion of Dr. Tomeh, an orthopedist who examined  
17 Plaintiff in February 2009. (Tr. 18, 1000-002.) Dr. Tomeh diagnosed  
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19 <sup>1</sup>Under Title XVI, benefits are not payable before the date of  
20 application. 20 C.F.R. §§ 416.305, 416.330(a); S.S.R. 83-20. The  
21 ALJ properly considered evidence dated before the application date,  
22 but noted that impairments which may have been considered severe  
23 before the date of application are not severe as of the application  
24 date because the evidence does not establish them as causing more than  
25 a minimal limitation on the ability to perform basic work activities.  
26 (Tr. 12.); 20 C.F.R. § 416.912. The period at issue for an SSI claim  
27 is the period between the date of application and the ALJ's decision.  
28 See *Cruse v. Bowen*, 867 F.2d 1183, 1185 (10<sup>th</sup> Cir. 1989).

1 functional low back pain and noted review of x-rays of the lumbar  
2 spine showed good alignment, no listhesis and no narrowing of the disc  
3 spaces. (Tr. 1001.) Plaintiff scored 5/5 in all areas on the lower  
4 extremity motor exam scale and normal in all areas on the on the lower  
5 extremity sensory exam. (Tr. 1001.) The ALJ reasonably interpreted  
6 the evidence after the date of application to reflect no continuing  
7 limitations. It is the ALJ's duty to resolve conflicts and ambiguity  
8 in the medical and non-medical evidence. *See Morgan v. Commissioner*,  
9 169 F.3d 595, 599-600 (9<sup>th</sup> Cir. 1999). It is not the role of the court  
10 to second-guess the ALJ. *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir.  
11 1984). The ALJ's conclusions are supported by substantial evidence in  
12 the record and the ALJ did not err in rejecting Dr. Weir's opinion.

## 13       **2. Dr. Phillips**

14       Plaintiff argues the ALJ failed to properly reject the opinion of  
15 Dr. Phillips. (ECF No. 14 at 14.) On July 19, 2006, Dr. Phillips  
16 performed Plaintiff's hysterectomy. (Tr. 443-44.) He noted a long  
17 history of gynecological problems including fibroids and polycystic  
18 ovarian disease. (Tr. 458.) On July 23, July 30, August 2, and  
19 August 9 of 2006, Plaintiff sought emergency room treatment for  
20 abdominal pain. (Tr. 437, 546, 549, 583.) On July 23, Plaintiff was  
21 treated for constipation in the emergency room, but otherwise was  
22 noted to have benign exams and was in no distress during ER visits.  
23 (Tr. 546, 549.) It was noted that Plaintiff had a history of drug-  
24 seeking behavior. (Tr. 546.) Plaintiff called Dr. Phillips' office  
25 on August 10 seeking stronger pain medication. (Tr. 472.)

26       On August 17, 2006, Dr. Phillips completed a DSHS Request for  
27 Medical Information form. (Tr. 405-06.) He opined that Plaintiff was  
28 unable to stand or sit for prolonged periods and was unable to lift.

1 (Tr. 405.) He also indicated that Plaintiff's condition was expected  
2 to last more than 12 months if her eight year-old son was not removed  
3 from the home.<sup>2</sup> (Tr. 406.) The last record from Dr. Phillips is a  
4 note that Plaintiff called the office in September 2006 and was  
5 "adamant" about getting pain medication. (Tr. 450.) Plaintiff's  
6 insurance would not authorize payment for the prescription without Dr.  
7 Phillips' signature because the previous prescription had been filled  
8 too recently. (Tr. 450.) Dr. Phillips refused to authorize the  
9 prescription. (Tr. 450.) No other records from Dr. Phillips are  
10 included in the transcript.

11 The ALJ did not discuss Dr. Phillips' opinion that Plaintiff was  
12 limited in sitting, standing and lifting. Plaintiff argues the ALJ  
13 failed to properly reject the opinion and that it should be credited.  
14 (ECF No. 14 at 14.) The ALJ need not discuss all evidence presented,  
15 but must explain why significant probative evidence has been rejected.  
16 *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9<sup>th</sup> Cir. 1984); see also  
17 *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9<sup>th</sup> Cir. 2003).  
18 Dr. Phillips' August 17, 2006, opinion was recorded shortly after  
19 abdominal surgery and nearly two years before Plaintiff's application  
20 date. Furthermore, Dr. Phillips noted Plaintiff's condition would be  
21 expected to last more than 12 months only if Plaintiff's eight year-  
22 old son remained in the home. (Tr. 406.) Plaintiff's son reportedly  
23 moved from the home in December 2006. (Tr. 659, 729.) Dr. Phillips  
24 August 2006 opinion is not particularly relevant to Plaintiff's  
25 condition at the date of application and does not suggest a continuing  
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27 <sup>2</sup>Plaintiff reported her son has bipolar disorder and severe  
28 behavioral problems. (Tr. 659, 729.)

1 disability. The ALJ pointed out that the most important evidence was  
2 the evidence post-application date of May 27, 2008. (Tr. 15-16.)  
3 Although the ALJ considered earlier evidence and discussed much of  
4 that evidence, Dr. Phillips' records do little to illuminate  
5 Plaintiff's limitations at the time of application. As a result, Dr.  
6 Phillips statement of limitations is not significant probative  
7 evidence and the ALJ did not err by failing to discuss his opinion.

8 **C. Step Two**

9 Plaintiff argues the ALJ erred by failing to identify any  
10 physical condition as a severe impairment at step two. (ECF No. 14 at  
11 13-14.) Specifically, Plaintiff argues the ALJ should have found  
12 chronic lumbosacral strain, neuropathy of the right foot,  
13 fibromyalgia, osteoarthritis and a history of headaches are severe  
14 impairments. (ECF No. 14 at 13.) At step two of the sequential  
15 process, the ALJ must determine whether Plaintiff suffers from a  
16 "severe" impairment, i.e., one that significantly limits his or her  
17 physical or mental ability to do basic work activities. 20 C.F.R. §  
18 416.920(c). To satisfy step two's requirement of a severe impairment,  
19 the claimant must prove the existence of a physical or mental  
20 impairment by providing medical evidence consisting of signs,  
21 symptoms, and laboratory findings; the claimant's own statement of  
22 symptoms alone will not suffice. 20 C.F.R. § 416.908. The fact that  
23 a medically determinable condition exists does not automatically mean  
24 the symptoms are "severe" or "disabling" as defined by the Social  
25 Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair*,  
26 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549050 (9th Cir.  
27 1985).

28 The Commissioner has passed regulations which guide dismissal of

1 claims at step two. Those regulations state an impairment may be  
2 found to be not severe when "medical evidence establishes only a  
3 slight abnormality or a combination of slight abnormalities which  
4 would have no more than a minimal effect on an individual's ability to  
5 work." S.S.R. 85-28. The Supreme Court upheld the validity of the  
6 Commissioner's severity regulation, as clarified in S.S.R. 85-28, in  
7 *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987). "The severity  
8 requirement cannot be satisfied when medical evidence shows that the  
9 person has the ability to perform basic work activities, as required  
10 in most jobs." S.S.R. 85-28. Basic work activities include: "walking,  
11 standing, sitting, lifting, pushing, pulling, reaching, carrying, or  
12 handling; seeing, hearing, and speaking; understanding, carrying out  
13 and remembering simple instructions; responding appropriately to  
14 supervision, coworkers and usual work situations; and dealing with  
15 changes in a routine work setting." *Id.*

16 As explained in the Commissioner's policy ruling, "medical  
17 evidence alone is evaluated in order to assess the effects of the  
18 impairments on ability to do basic work activities." S.S.R. 85-28.  
19 Thus, in determining whether a claimant has a severe impairment, the  
20 ALJ must evaluate the medical evidence.

21 Plaintiff argues the opinions of Dr. Phillips and Dr. Weir  
22 support finding additional severe impairments. (ECF No. 14 at 13.)  
23 As discussed *supra*, the ALJ properly rejected the opinion of Dr. Weir  
24 and Dr. Phillips' opinion is not particularly probative of Plaintiff's  
25 limitations at the time of application. Plaintiff further argues her  
26 testimony establishes additional severe impairments. (ECF No. 14 at  
27 15.) As also discussed *supra*, the ALJ's credibility determination is  
28 supported by clear and convincing reasons and by substantial evidence.

1 The ALJ discussed the evidence supporting the step two findings in  
2 detail, citing the substantial evidence in the record in support.  
3 (Tr. 11-12.) Therefore, the ALJ did not err at step two.

4 **D. RFC and Hypothetical**

5 Plaintiff argues the ALJ erred by posing a hypothetical to the  
6 vocational expert which does not take into account all of Plaintiff's  
7 mental limitations. (ECF No. 14 at 18-19.) The ALJ's hypothetical  
8 must be based on medical assumptions supported by substantial evidence  
9 in the record that reflects all of the claimant's limitations.  
10 *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9<sup>th</sup> Cir. 2001). The  
11 hypothetical should be "accurate, detailed, and supported by the  
12 medical record." *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9<sup>th</sup> Cir.  
13 1999). Plaintiff argues the ALJ failed to take into account all of  
14 the mental limitations assessed by Dr. Flanagan in formulating the RFC  
15 and hypothetical to the vocational expert. (ECF No. 14 at 18.)

16 Dr. Flanagan, a reviewing psychologist, completed a Mental  
17 Residual Functional Capacity Assessment form on February 3, 2009.  
18 (Tr. 960-63.) She assessed five moderate limitations in the following  
19 areas: the ability to maintain attention and concentration for  
20 extended periods; the ability to work in coordination with or  
21 proximity to others without being distracted by them; the ability to  
22 complete a normal workday and workweek without interruptions from  
23 psychologically based symptoms and to perform at a consistent pace  
24 without an unreasonable number and length of rest periods; the ability  
25 to interact appropriately with the public; and the ability to get  
26 along with coworkers or peers without distracting them or exhibiting  
27 behavioral extremes. (Tr. 960-61.) The explanatory comments  
28 indicate, "Clmt appears cognitively intact and capable of simple and

1 complex tasks. May have difficulty with persistence, pace and  
2 concentration on occasion due to physical symptoms. Nonetheless  
3 capable of productive work." (Tr. 962.) Dr. Flanagan also opined  
4 that Plaintiff would work best without frequent interaction with the  
5 general public or coworkers. (Tr. 962.)

6 The ALJ noted Dr. Flanagan's findings and did not reject them.  
7 (Tr. 13-14, 20.) The ALJ formulated an RFC containing the following  
8 mental limitations: Plaintiff is limited to simple, non-complex work  
9 involving infrequent interaction with the general public and no more  
10 than superficial contact with co-workers. (Tr. 14.) Plaintiff argues  
11 the ALJ should have also included a limitation on concentration,  
12 persistence and pace in the RFC and the hypothetical to the vocational  
13 expert. (ECF No. 14 at 19.) However, Dr. Flanagan indicated  
14 difficulty with concentration, persistence and pace "may" occur "on  
15 occasion" and would be caused by physical symptoms. (Tr. 962.) Dr.  
16 Flanagan based her opinion in part on Dr. Bailey's January 29, 2009,  
17 examination. (Tr. 955-58.) Dr. Bailey noted that regarding  
18 concentration and persistence, Plaintiff's cognition is generally  
19 intact. (Tr. 957.) He indicated persistence is mostly limited by  
20 physical problems by Plaintiff's self-report. (Tr. 957.) Since the  
21 physical symptoms reported by Plaintiff were determined to be not  
22 credible by the ALJ, and the limitations on concentration, persistence  
23 and pace identified by Dr. Bailey and Dr. Flanagan depend on physical  
24 symptoms, the ALJ did not err by failing to include a limitation on  
25 concentration, persistence and pace in the RFC and hypothetical to the  
26  
27  
28

1 vocational expert.<sup>3</sup>

2 The RFC is supported by substantial evidence in the record and  
3 the hypothetical to the vocational expert properly incorporated the  
4 limitations identified by the ALJ. The hypothetical posed to the  
5 vocational expert contained all of the limitations that the ALJ found  
6 credible and supported by substantial evidence in the record. The  
7 ALJ's reliance on testimony the VE gave in response to the  
8 hypothetical therefore was proper. See *Magallenes v. Bowen*, 881 F.2d  
9 747, 756-57 (9<sup>th</sup> Cir. 1989) (holding that it is proper for an ALJ to  
10 limit a hypothetical to restrictions supported by substantial evidence  
11 in the record). *Bayliss v. Barnhart*, 427 F. 3d 1211, 1217-18 (9<sup>th</sup> Cir.  
12 2005). As a result, the ALJ did not err.

#### 13 CONCLUSION

14 Having reviewed the record and the ALJ's findings, this court  
15 concludes the ALJ's decision is supported by substantial evidence and  
16 is not based on error. Accordingly,

#### 17 IT IS ORDERED:

18 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
19 **GRANTED.**

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 <sup>3</sup>Other supporting evidence cited by the ALJ includes the  
22 psychological assessment of Dr. Everhart in May 2007 who determined  
23 Plaintiff's attention, concentration and intellectual ability appeared  
24 within normal limits (Tr. 19, 663); and the psychological evaluation  
25 by Dr. Guzzardo in September 2007 who opined Plaintiff did not  
26 demonstrate inattention, impulsivity, motor restlessness or  
27 distractability but did demonstrate mild difficulty with sustained  
28 attention (Tr. 20, 733-34).

DATED December 29, 2011.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT -21